

**BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Complaint of MCI WorldCom, Inc.)
against New England Telephone and Telegraph Company)
d/b/a Bell Atlantic-Massachusetts for breach of) DTE 97-116
interconnection terms entered into under Sections 251)
and 252 of the Telecommunications Act of 1996)

COMMENTS OF RCN-BECOCOM, L.L.C.

RCN-BecoCom, L.L.C. ("RCN-BecoCom"), by undersigned counsel and pursuant to the Memorandum dated May 23, 2001 to All Parties and Commenters to D.T.E. 97-116, respectfully submits these comments regarding the impact on this proceeding of the Federal Communications Commission's ("FCC") recent *ISP Traffic Order*.¹

I. INTRODUCTION AND BACKGROUND

A. The FCC Decision

On April 27, 2001, the FCC issued its *ISP Traffic Order* regarding intercarrier compensation for traffic bound for an Internet service provider ("ISP"). In the *Order*, the FCC ruled that ISP-bound traffic was "information access" as that term is used in Section 251(g) of the Telecommunications Act of 1996, and that Section 251(g) excluded certain classes of traffic from the requirements of Section 251(b)(5) of the Act governing reciprocal compensation for the transport and termination of telecommunications.² Under its authority under Section 201 of the

¹ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, FCC 01-131, CC Dkt. Nos. 96-98, 99-68 (rel. Apr. 27, 2001) ("*ISP Traffic Order*" or "*Order*").

² *ISP Traffic Order* at ¶ 46.

Communications Act of 1934, the FCC established an interim regime for intercarrier compensation for ISP-bound traffic.³

The FCC also preempted the authority of the states to issue rulings regarding compensation for ISP-bound traffic for the period after the effective date of the *Order*: “Because we now exercise our authority under Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic. . . state commissions will no longer have authority to address this issue.”⁴ Therefore, as of the effective date of the *ISP Traffic Order*, the Department will be divested of authority to rule on the issue of intercarrier compensation for ISP-bound traffic on a forward-looking basis.

Nevertheless, the Department retains authority to resolve disputes regarding intercarrier compensation for ISP-bound traffic for the period prior to the effective date of the *Order*: “This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.”⁵ Therefore, the Department may revisit, and now resolve, the dispute regarding compensation for ISP-bound traffic exchanged prior to the date of the *Order*.

B. The Department Decision

Earlier in this proceeding, the Department ruled that Bell Atlantic-Massachusetts, now known as Verizon – Massachusetts, was not required to pay terminating compensation to carriers that provide terminating switching for traffic to ISPs.⁶ In the *Decision*, the Department established a rebuttable presumption that traffic in excess of a ratio of 2:1 (terminating minutes

³ *Id.* at ¶¶ 77-82.

⁴ *Id.* at ¶ 82.

⁵ *Id.*

⁶ D.T.E. 97-116-C (May 19, 1999) (“*Decision*”). The *Decision* is presently on appeal before the United States District Court for the District of Massachusetts. *Global NAPs, Inc. v. New England Telephone & Telegraph Co.*, CA Nos. 00-CV-10407, 00-CV-10502, 00-CV-10513 (D.Mass). RCN-BecoCom is a party to that appeal

to originating minutes) was ISP-bound traffic.⁷ The Department, however, left unanswered the ultimate question of how carriers should be compensated for traffic to ISPs that they terminate for customers of other carriers.

The *Order* now requires the Department to resolve the issue of compensation for traffic exchanged prior to the *Order's* effective date, and to implement the terms of the *Order* on a prospective basis. For traffic exchanged prior to the *Order*, the *Order* justifies re-examination of the *Decision* in order to appropriately compensate terminating carriers for the services they provide. For traffic exchanged after the effective date of the *Order*, the Department must revise its *Decision* in order to implement the *Order* in Massachusetts, but it is premature to say how that would be accomplished because Verizon has not yet offered to adopt the federal regime in Massachusetts.

II. THE DEPARTMENT SHOULD NOW REQUIRE VERIZON TO COMPENSATE TERMINATING CARRIERS FOR THE PERIOD PRIOR TO THE *ORDER*

In the *Decision*, the Department vacated an earlier ruling that provided compensation to terminating carriers serving ISPs. The Department stated then, “Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations under their interconnection agreement, there is – *post* February 26, 1999 – no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.”⁸ Further, the Department anticipated that, because terminating carriers incur costs to terminate ISP-bound traffic,⁹ a resolution of the intercarrier compensation

proceeding, and is asking the District Court to vacate and remand the Department’s *Decision*. RCN-BecoCom’s comments here should not be construed as a waiver of any of its arguments in that case.

⁷ *Decision* at p. 28, n.31.

⁸ *Decision* at p. 26.

⁹ *Decision* at 28-9.

issue would be forthcoming: “[Bell Atlantic’s proposed] arrangement is reasonable for the nonce, i.e., until the dispute is settled.”¹⁰ In its ruling denying reconsideration of the *Decision*, the Department stated, “We recognize that the FCC’s NPRM concerns the appropriate permanent compensation mechanism for ISP-bound traffic.”¹¹ The Department advised the parties to return to the Department when that proceeding resulted in a decision.¹²

The FCC has now provided a framework for the Department to consider in order to settle this dispute. As stated above, the *Order* clearly recognizes the Department’s authority to resolve disputes regarding traffic exchanged prior to the effective date of the *Order*.¹³ Because State authority over compensation for ISP-bound traffic is retained “for the period prior to the effective date” of the *Order*, the Department may complete the review that it held in abeyance pending the outcome of the FCC NPRM. Although the *Order* has only prospective legal effect, it provides a sufficient basis, consistent with the *Decision*, for the Department to rule that Verizon owes terminating compensation to RCN-BecoCom for the period from Verizon’s last payment of reciprocal compensation for ISP-bound traffic to RCN-BecoCom to the effective date of the *Order*.¹⁴

First, like the *Decision*, the *Order* recognizes that carriers incur costs to terminate traffic to ISPs, and that those costs are the same as costs to terminate voice traffic: “The record . . . fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP. Assuming the two calls have otherwise identical characteristics (*e.g.*, duration and time of day), a LEC generally will incur the same

¹⁰ *Decision* at p. 28.

¹¹ D.T.E. 97-116-D, D.T.E. 99-39, *Order Denying Motions for Reconsideration and Dismissing Global NAPs Complaint* (Feb. 25, 2000) at 20.

¹² *Id.*

¹³ *ISP Traffic Order* at ¶ 82.

costs when delivering a call to a local end-user as it does delivering a call to an ISP.”¹⁵ The FCC went on to reject claims asserted by ILECs that CLECs’ costs are lower to provide service to ISPs.¹⁶

Second, it would be “unwise as a policy matter” and “patently unfair” for Verizon to receive reciprocal compensation for traffic it terminates when a traffic imbalance is in Verizon’s favor, but not to pay compensation to other carriers that terminate calls to ISPs.¹⁷ In order to rectify this inequity, as long as Verizon has received any terminating compensation from other local carriers, including CMRS carriers, the Department should require Verizon to compensate carriers that terminate ISP-bound traffic. In RCN-BecoCom’s case, this true-up must look backward to the last payment made by Verizon to RCN-BecoCom for ISP-bound traffic, and the rates paid to RCN-BecoCom should be the reciprocal compensation rates in the interconnection agreement between RCN-BecoCom and Verizon to terminate local and CMRS traffic.

Third, a retrospective true-up at the same rates paid to Verizon is consistent with the FCC’s statements in the *Order* that validate the CLEC arguments in this proceeding. The FCC said that, under its own precedent, the term “local call” “could be interpreted as meaning . . . traffic subject to local rates” in addition to “traffic that is *jurisdictionally* intrastate.”¹⁸ Further, the Commission explained, going forward “[w]e also refrain from generically describing traffic as ‘local’ traffic because the term ‘local,’ not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly is not a term used in section 251(b)(5) or

¹⁴ See *Decision* at p. 27-28 and n.30 allowing Bell Atlantic to withhold compensation for ISP-bound traffic as of the effective date of the FCC’s previous ruling on intercarrier compensation for ISP-bound traffic, including compensation for ISP-bound traffic exchanged prior to such effective date.

¹⁵ *ISP Traffic Order* at ¶ 90.

¹⁶ *Id.* at ¶¶ 90-94.

¹⁷ *Id.* at ¶ 89.

¹⁸ *Id.* at ¶ 45 (italics in original, underlining added).

section 251(g).”¹⁹ Thus, the Commission plainly recognizes that prior to the *ISP Traffic Order* (at a minimum), the term “local traffic” could be construed precisely as RCN-BecoCom and the other participating CLECs have construed it in this proceeding.

Given that the FCC recognizes that carriers terminating calls to ISPs incur costs that should be compensated at the same rates as traffic terminated to any other local end-users, and also given that the FCC has now validated the CLEC arguments previously made in this proceeding, the Department should order a retrospective true-up of terminating compensation for ISP-bound traffic at the contractual reciprocal compensation rates between Verizon and the CLEC parties.

III. THE DEPARTMENT MUST IMPLEMENT A NEW INTERCARRIER COMPENSATION REGIME CONSISTENT WITH THE *ORDER*

As a result of the *Order*, the intercarrier compensation regime in Massachusetts must be substantially revised on a prospective basis. When the *Order* is implemented, all local, CMRS, and ISP-bound traffic must be exchanged either at contractual reciprocal compensation rates, or pursuant to the rates and traffic exchange ratios described in the *Order*. Unfortunately, at this point it is still premature to say exactly how the Department should reconcile its *Decision* with the *Order* and implement the revisions to the compensation regime. Implementation of the *ISP Traffic Order* is entirely dependent on whether Verizon chooses to adopt its terms in Massachusetts.²⁰ Under the terms of the *Order*, Verizon must make a formal offer to interconnected carriers to exchange all traffic at rates set forth in the *Order*. If Verizon fails to make a valid offer to RCN-BecoCom by June 14, 2001, the effective date of the *Order* (unless

¹⁹ *Id.* at ¶ 34 (emphasis added).

²⁰ *Id.* at ¶ 89.

stayed) and the day after these comments are due,²¹ RCN-BecoCom will assume Verizon intends not to adopt the terms of the *ISP Traffic Order*.

In the event that Verizon chooses not to adopt the federal regime, the *ISP Traffic Order* requires Verizon to pay reciprocal compensation at the contract or state-approved rate to carriers terminating ISP-bound traffic, despite the Department's *Decision*. Thus, under the terms of the *Order*, "[f]or those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts."²² As long as the parties have agreed to pay reciprocal compensation for local or section 251(b)(5) traffic, those rates apply to ISP-bound traffic if Verizon does not adopt the federal regime. If Verizon fails to make a formal offer to interconnected carriers to adopt the federal regime by June 14, 2001, the Department should issue a ruling that, pursuant to the *ISP Traffic Order*, all local, section 251(b)(5) and ISP-bound traffic will be subject to reciprocal compensation at the rates in carriers' interconnection agreements.

If Verizon does make a valid offer to CLECs by June 14, 2001 to adopt the terms of the *ISP Traffic Order*, then Verizon must compensate RCN-BecoCom using the rates and traffic exchange ratios identified in the *Order*. There is no state-set rate for ISP-bound traffic in Massachusetts, so the new federal rates would apply by default.

IV. CONCLUSION

In order to resolve the "now-unresolved dispute" regarding intercarrier compensation for ISP-bound traffic for the period prior to the effective date of the *ISP Traffic Order*, the

²¹ Verizon has not yet made such a valid offer to RCN-BecoCom.

²² *ISP Traffic Order* at ¶ 89 (emphasis in original).

Department should heed the conclusions reached by the FCC. The Department should order the carriers to conduct a retrospective true-up of compensation for traffic to ISPs at the same rates as Verizon has been paid to terminate local and CMRS traffic.

On a prospective basis, it is premature to say how the Department must reconcile its *Decision* with the FCC's *ISP Traffic Order* because Verizon has not yet made a formal offer to RCN-BecoCom to adopt the terms of the *Order*. If Verizon were to make such an offer, the federal rates and traffic exchange ratios would apply by default.

Respectfully submitted,

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